

Brian K. Murphy (admitted *pro hac vice*)
Jonathan P. Misny (admitted *pro hac vice*)
Murray Murphy Moul + Basil LLP
1114 Dublin Road
Columbus, OH 43215
Telephone: 614.488.0400
Facsimile: 614.488.0401
E-mail: murphy@mmmb.com
misny@mmmb.com

Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

MARK FITZHENRY, on behalf of himself	:	
and others similarly situated,	:	Case No. 2:21-cv-00501-DAK-CMR
	:	
Plaintiffs,	:	District Judge Dale A. Kimball
	:	
v.	:	Magistrate Judge Cecilia M. Romero
	:	
VIVINT, INC., et al.,	:	
	:	
Defendants.	:	
	/	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT VIVINT, INC.’S
MOTION TO STRIKE CLASS ALLEGATIONS**

Vivint’, Inc.’s (“Vivint’s”) Motion to Strike is entirely premised on a local rule that does not exist now and did not exist at the time Vivint filed its motion. As of December 1, 2021, the 90-day period for moving for class certification found in a previous version of Local Rule 23-1 has been eliminated. Given there is no 90-day period to move for class certification under the effective Local Rules of this Court, the class allegations in this case should not be struck on that basis, and Vivint’s Motion should be denied.

Vivint's Motion to Strike should also be denied because even under the prior local rule that is no longer in effect, the 90-day time limit only applied "unless the court otherwise orders." The Court has otherwise ordered here. The Court set the initial case schedule in this case on October 15, 2021 and set a fact discovery cutoff of April 14, 2022. (Doc. 52.) Plaintiff promptly issued discovery thereafter to Vivint on October 20, 2021, making it due only three days (one business day) before the purported class certification deadline. It is simply unrealistic to expect Plaintiff to move for class certification only approximately 30 days after the case schedule was set in the first place and the next business day after Plaintiff received Vivint's initial production of documents. Plaintiff did not understand that to be the Court's intention in setting a schedule that allowed for nearly five more months of discovery on both class and merits issues.

Alternatively, Plaintiff has already shown good cause for not filing a motion for class certification within 90 days. Plaintiff has yet to be able to serve one of the defendants, RS&I, Inc. ("RS&I"), and is awaiting a ruling as to whether the Court will extend the time for service under Rule 4(m). RS&I and/or its vendors have critical records of the calls to the class members that will determine the scope of the class Plaintiff seeks to certify. To move for class certification before any discovery can be taken from RS&I would be premature. Plaintiff has already explained in detail his diligence and why there was good cause to extend the deadline for service of RS&I and hereby incorporates that explanation here. (*See* Doc. 56, pp. 2-3.) Plaintiff recognizes that under Federal Rule of Civil Procedure 23, Plaintiff is to move for class certification at an "early practicable time"; however, without being able to take any discovery whatsoever from the Defendant anticipated to have class calling records, it is not currently practicable to move for class certification.

For the foregoing reasons, Vivint's Motion to Strike should be DENIED.

Respectfully submitted,

/s/ **Brian K. Murphy**

Brian K. Murphy (admitted *pro hac vice*)
Jonathan P. Misny (admitted *pro hac vice*)
Murray Murphy Moul + Basil LLP
1114 Dublin Road
Columbus, OH 43215
Telephone: 614.488.0400
Facsimile: 614.488.0401
E-mail: murphy@mmmb.com
misny@mmmb.com

Jared B. Pearson (Utah Bar No. 12200)
Pearson Law Firm, PLLC
9192 South 300 West, Suite 35
Sandy, UT 84070
Telephone: 801.888.0991
E-mail: jared@pearsonlawfirm.org

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will automatically provide notice to all counsel of record by electronic means.

/s/ **Brian K. Murphy**

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